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ALEXANDER L. STEVAS,
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CASE NO. 80-2146

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

THE STATE OF FLORIDA,

Petitioner,

vs.

MARK ROYER,

Respondent.

On Petition for a Writ of Certiorari to the Third District Court of Appeal of Florida

REPLY BRIEF OF PETITIONER

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I

ARGUMENT

1.) MOOTNESS.

The Defendant contends that because the Defendant has been discharged pursuant to the mandate of the Third District Court of Appeal of Florida in Royer v. State, 389 So.2d 1007 (Fla. 3d DCA 1980), that thereby the cause herein is moot. The State was unsuccessful in both the District Court of Appeal and the Supreme Court of Florida in seeking a stay and by that time, the Defendant had been discharged. See, Respondent's Appendix.

In Sibron v. New York, 392 U.S. 40, at 56-57 (1968) the court explained that, "a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged

conviction." In Carafas v. La Vallee, 391 U.S. 234 (1968), the court refused to find mootness, where the defendant had completed his sentence, because the conviction had potential collateral consequences. In view of the foregoing rationale enabling a defendant to continue to challenge his conviction, in Pennsylvania v. Mimms, 434 U.S. 106, at 109, n.3 (1977) the court reasoned that because of the same potential for collateral consequences, the State likewise could seek to uphold the validity of its convictions even though the defendant had completed his sentence. The principle is sound for, "justice due the accused is also due the accuser." Snyder v. Massachussetts, 291 U.S. 97, at 122 (1933) (Cardoyo, J.).

Under Pennsylvania v. Mimms and Sibron the Defendant's claim of mootness is without basis. The Defendant here has never

even begun to serve his sentence. In the event of a reversal the Third District Court of Appeal of Florida under Florida practice and procedure will simply withdraw its previous mandate and reissue its mandate consistent with the ruling of this Court. Cf., e.g., Abreau v. State, 365 So.2d 201 (Fla. 3d DCA 1978), after remand from, 363 So.2d 1063 (Fla. 1978). Moreover, the collateral consequences of the conviction, which the State seeks to sustain abound. See, § 561.15(2) Fla.Stat. (liquor license); § 562.13(3)(a) Fla.Stat. (manager, bartender); §112.011 Fla.Stat. (licenses, employment); § 552.094(5)(b) Fla.Stat. (license for explosives); §§ 790.06 and 790.23 Fla.Stat. (firearms); § 633.34 Fla.Stat. (employment as firefighter); § 744.474 Fla.Stat. (10) (guardianship); § 550.181 Fla.Stat. (1)(b) (gambling license); § 943.13 Fla.Stat. (law enforcement); § 114.01 Fla.Stat.

(public office); §§ 97.041, 98.201, 98.301 Fla.Stat. (voting); § 921.141(6)(a) Fla. Stat. (death penalty); § 775.084 Fla.Stat. (habitual offenders). It is therefore wholly apparent that the present petition is not feigned, abstract or hypothetical and therefore under Sibron and Mimms the contention of mootness is uttlerly without merit.

2.) STANDARD OF REVIEW.

For the first time in this Honorable Court, the Defendant attempts to assert that the cause herein should be affirmed under a stricter standard of review which he claims is contained in Article I, Section XII of the Florida Constitution. Contrary to the Defendant's analysis, in Hetland v. State, 366 So.2d 831, at 836 (Fla. 2d DCA 1979) the court expressly held that Article I, Section XII of the Florida Constitution does not apply a higher

standard than that of the Fourth Amendment. The Florida Supreme Court in Hetland v. State, 387 So.2d 963 (Fla. 1980), expressly approved and adopted the opinion by the district court of appeal in Hetland. See also, § 933.19 Fla.Stat. [adopting Carroll v. United States, 267 U.S. 132 (1925)]. The constitutional issues herein were presented and fully argued at all levels of the proceedings below in the context of the applicable rules and prohibitions of the United States Constitution.

3.) PRESERVATION OF GOOD FAITH EXCEPTION ARGUMENT.

The Defendant contends in a summary fashion that the State failed to raise the "good faith exception" argument in the Court below and therefore this Honorable Court should not entertain the issue. To the contrary, it was defense counsel who first launched the attack into the officer's good faith in approaching and

arresting the Defendant. See Joint Appendix at 57A-58A. Indeed, the prosecutor was forced to immediately reply upon redirect examination to defense counsel's attack. Id. at 73A-74A. Furthermore, in the State's brief upon en banc rehearing in the Florida Third District Court of Appeal, which has been provided to this Court by the Florida District Court of Appeal, the undersigned vigorously argued the good faith of the officers in responding to the circumstances as they perceived them in their training and experience. See, State Brief En Banc, pp. 38-39; 50-54; 58-72. Finally, in its Petition for a Writ of Certiorari, the State purposely stated its "question presented" in broad terms to emcompass the good faith exception argument and specifically raised the good faith exception argument at pages 28-29 of its brief on jurisdiction. The State submits that therefore the issue of the good

faith exception has been "fairly comprised" by the petition presented, and was fairly presented to the Courts below. See, United v. Mendenhall, 446 U.S. 544 at n.5 (1980).

Moreover, this honorable Court should address this issue as a question of great public importance and consistent with other momentus decisions reached by this Court upon the criminal law in this century. The present question clearly consists of the "exceptional circumstance" wherein this Court has addressed new issues of law. Indeed, an argument could be made that the State could not raise this issue anywhere but the Florida Supreme Court, which declined to accept jurisdiction. See, Walden v. State, 387 So.2d 368 (Fla. 1st DCA 1981).

4.) STATE'S CONCESSION IRRELEVANT.

The Defendant attempts to bolster his argument that he was somehow "seized" by noting that the Florida Third District Court of Appeal states in its opinion that the State "conceded at the oral argument" that the officers in the present case would not have let the Defendant leave the room if he thought he could. See 389 So. 2d at 1018. There is no taped recording of the oral argument in the Florida Third District Court of Appeal. However, the undersigned argued the cause at all levels for the State and submits to this Court that after ten (10) minutes of discussion with the undersigned, the undersigned stated at oral argument only: 1) that neither the undersigned nor the Court was there and therefore should not speculate as o whether or not the Defendant would have left before any further proceedings and 2) that assuming that the circumstances

amounted to articable suspicion, the officers would not have let the Defendant go had he refused consent. Certainly in that event, the officers could have readily sought other means of gathering information including the use of a trained narcotics dog. See United States v. Sullivan, 625 F.2d 9 (4th Cir. 1980); Sizemore v. State, 390 So.2d 401 (Fla. 3d DCA 1980); Harpold v. State, 389 So.2d 279 (Fla. 3d DCA 1980). Furthermore, the State submits that what might have happened if the Defendant had refused consent to open his suitcase is not particularly relevant to proper constitutional analysis. Certainly at that point, the detectives would have had to weigh their facts, experience and consider possible alternatives. Certainly, up to the point of the Defendant's consent to open his suitcase the officers were merely reacting to the Defendant's overt manifestation that the transaction was

voluntary. In Oregon v. Mathiason, 429 U.S. 492 (1977), the court held that Miranda warnings were not required because a defendant spoke with officers at a police station at the request of the officers. The court explained that there was no indication that the questioning of the defendant took place in a context where the defendant's freedom to depart was restricted in any way. Therefore, the defendant was not "in custody" for purposes of requiring Miranda warnings. The court further explained that Miranda warnings would not be required simply because the questioning took place in a police station or because the questioned person is one whom the police suspect. 429 U.S. at 495. In the present case, the Defendant's "apparent spirit of cooperation" and the noncoersive nature of the transaction manifest a conclusion under Mathiason that the Defendant herein was not "in custody" and hence under

arrest as the Defendant contends in his brief before this Court. In fact as noted in the State's brief on the merits, the Defendant himself stated that he was not "under arrest" in the room. See Joint Appendix at 84A. Merely that the Defendant was in the "police room" as the District Court of Appeal referred to it or that the Defendant was a suspect was not sufficient to classify him as being "in custody" under Oregon v. Mathiason.

5.) THE PRESENT TRANSACTION WAS LAWFUL.

The Defendant, relying heavily upon Reid v. Georgia, 448 U.S. 438 (1980) contends that all profile transactions are detentions and that the movement to a room forty (40) feet away for further discussion was an arrest. First of all, a careful reading of Reid v. Georgia reveals that the court quite clearly confined its holding to

the premise that if the judgment of the court was to be predicated upon a Terry "stop" upon the facts stated by the Georgia appellate court, the "stop" was not lawful. Reid made no effort to condemn all transactions based upon the so-called "profile". The Reid court furthermore never reached the issues of consent or contact upon the facts stated in Reid. See, (Powell, Burger, Blackmun, J.J. concurring). A proper analysis of Reid centers upon the fact that the Georgia appellate court rested its holding upon two (2) distinct alternative grounds numbered "1" and "2". See, State v. Reid, 149 Ga.App. 685, 255 S.E. 2d 71 (1979), cert. den., June 20, 1979 (Ga.Sup.Ct.). The second holding in the Georgia appellate court rested upon the fact that the entire transaction in Reid was a mere contact between the officer and the defendants. 255 S.E. 2d at 72-73. This court in Reid left the

foregoing alternative holding in the Georgia appellate court intact, even though the transaction may have begun with a "profile". Reid neither stands for the proposition that all profiles do not amount to articable suspicion or probable cause nor does it stand for the proposition that officers may not contact citizens on the street.

This analysis of Reid has been borne out upon remand after this Court's opinion in Reid. Upon remand, in State v. Reid, 156 Ga.App. 78, 274 S.E.2d 164 (1980) the Georgia appellate court affirmed the suppression of evidence. However, upon review by the Georgia Supreme Court in State v. Reid, 247 Ga. 445, 276 S.E.2d 617 (1981), the court reversed the appellate court finding that the entire transaction was merely a contact and that there was no "seizure". The court observed that there

was no objective reason for the defendants to believe that they were not free to go. On October 5, 1981, this Court denied certiorari. See Reid v. Georgia, ___U.S.___, 102 S.Ct. 369 (1981).

The Defendant also attempts to hypothesize innocent explanations for bits and pieces of the transaction herein as did the Florida Third District Court of Appeal. He reasons therefore that these "affirmative defenses" preclude any finding that the officer's actions in approaching the Defendant or detaining the Defendant or arresting the Defendant were not constitutionally reasonable. The Defendant's proposal of possible innocent explanations for bits and pieces of the transaction herein is not only implausible but constitutes a completely improper standard of constitutional analysis.

The factors observed by the officers should not be isolated but rather should be considered with respect to the totality of the circumstance together with the training and experience of the officers. See United States v. Cortez, 449 U.S. 411 (1981); Draper v. United States, 358 U.S. 307 (1964); Brinegar v. United States, 388 U.S. 160 (1947); United States v. Berry, 670 F.2d 583 (5th Cir. 1982). In Brinegar v. United States, the court explained the fundamental consitutional analysis from which probable cause must be derived:

> "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.
>
> "The substance of all the definitions of probable cause 'is a reasonable ground for belief of guilt.' And this 'means less than evidence which would justify condemnation' or conviction

> ...Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge, and of which they had reasonable trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that: an offense has been or is being committed,' Carroll v. United States, 267 U.S. 132, 162, 69 L.Ed. 543, 555, 45 S.Ct. 280, 39 ALR 790.
>
> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway from enforcing the law in the community's protection. Because many situations which confront officers in course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement."
>
> 388 U.S. at 176-178.

Finally, in Jackson v. United States, 302 F.2d 194 (D.C. Cir. 1962), the future Chief Justice of the United States Supreme Court, Burger, observed that probable cause must be weighed from the viewpoint of the

training and experience of the officer at the scene of the arrest, to wit:

> "We have indicated on many occasions that there are few absolutes in the area of the law dealing with what constitutes probable cause for arrest. We have also emphasized from time to time that probable cause is not to be evaluated from a remote vantage point of a library, but rather from the viewpoint of a prudent and cautious police officer on the scene at the time of arrest. The question to be answered is whether such an officer in the particular circumstances, conditioned by his observations and information, and guided by the whole of his police experience, reasonable could have believed that a crime had been committed by the person to be arrested."

Contrary to the Defendant's assertion, the State does not abandon the foregoing analysis as applicable in the present circumstance. It is therefore plainly evident that the Defendant's and the Florida Third District Court of Appeal's hypothesis of possible innocent explanations for bits and pieces of the transaction herein is not proper constitutional analysis. Indeed, in Michigan v. DeFillippo, 443 U.S.

31, at 36 (1979), the court explained the error which is also manifest herein, thus:

> "It is not disputed that the Constitution permits an officer to arrest a suspect without a warrant if there is probable cause to believe that the suspect has committed or is committing an offense. Adams v. Williams, 407 U.S. 143, 148-149, 92 S.Ct. 1921, 1924-1925, 32 L.Ed.2d 612 (1972); Beck v. Ohio, 379 U.S. 89, 91, 85 S. Ct. 223, 225, 13 L.Ed.2d 142 (1964). The validity of the arrest does not depend on whether the suspect actually committed a crime; the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest. We have made clear that the kinds and degree of proof and the procedural requirements necessary for a conviction are not prerequisites to a valid arrest. See Gerstein v. Pugh, 420 U.S. 103, 119-123, 95 S.Ct. 854, 865-867, 43 L.Ed.2d 54 (1975); Brinegar v. United States, 338 U.S. 160, 174-176, 69 S.Ct. 1302, 1310-1311, 93 L.Ed. 1879 (1949)." [Emphasis added].

See also Baker v. McCollan, 443 U.S. 137, at 145 (1979). Under DeFillipo, Brinegar and the foregoing authority the Defendant's position should be rejected.

II

CONCLUSION

The State submits that the prohibitions of the Fourth Amendment find no application

in the case at bar. Considering the nature of the present crime and the general absence of traditional felony indicia of criminality, the articulated facts in this case established for these highly trained and experienced officers, the reasonable probability that the Defendant was in fact transporting narcotics. These officers had an affirmative duty to act where in their specialized experience they believed a felony was taking place. See, United States v. Jodoin, 672 F.2d 232 (1st Cir. 1982) (alias and observed facts provide probable cause); see also, United States v. Rosselli, 506 F.2d 627 (7th Cir. 1974). The present ruling only serves to frustrate the effective administration of criminal justice, where through the imposition of a hypertechnical and unrealistic standard of review, the officers after extensive and conscientious police work correctly conclude that the Defendant is transporting

illicit narcotics, only to be later told that they should not have concluded that he was, even though the Defendant was transporting illicit narcotics!! Such a ruling serves only to strain the Constitution through a filament of unrealistic exatitude. To the contrary, there is no war between war between the constitution and common sense. See, State v. Nittolo, 317 So.2d 748 (Fla. 1975); see also, Royer v. State, 389 So.2d at 1020-1026 (Hubbart, J., concurring). The present ruling should therefore be reversed.

RESPECTFULLY SUBMITTED on this 5th day of October, 1982, at Tallahassee, Leon County Florida.

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